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Supreme Court, U.S.
FILED
AUG 5 - 2004
OFFICE OF THE CLERK

No. 03-1618

IN THE

Supreme Court of the United States

CATHOLIC CHARITIES OF SACRAMENTO, INC.,
Petitioner,
v.
CALIFORNIA, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the Supreme Court of California

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONER

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August 5, 2004

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INTEREST OF THE *AMICUS*

The Becket Fund for Religious Liberty respectfully submits this brief as *amicus curiae* in support of Petitioner pursuant to Rule 37.2 of this Court.[1]

The Becket Fund for Religious Liberty is an interfaith, nonpartisan, public-interest law firm dedicated to protecting the free expression of all religious traditions, and

1 All parties have consented to the filing of this brief, and their letters of consent have been filed simultaneously with this brief. No counsel for any party authored this brief in whole or in part. No person or entity other than *amicus* and their members made any monetary contributions to the preparation or submission of this brief.

the equal participation of religious people in public life and public benefits. The Becket Fund litigates in support of these principles in state and federal courts throughout the United States, both as primary counsel and as *amicus curiae*. Accordingly, the Becket Fund is frequently involved in litigation on behalf of religious individuals and institutions seeking relief under the Free Exercise Clause from governmental burdens on religious exercise.

The Becket Fund believes that its experience in this area of the law will enable it to aid the Court in understanding the extent of division – indeed, fragmentation – among the lower courts regarding the meaning of "hybrid" rights under the Free Exercise Clause, and so in deciding whether to grant the writ in this case.

SUMMARY OF THE ARGUMENT

In *Employment Division* v. *Smith*, 494 U.S. 872 (1990), this Court first articulated the concept of "hybrid rights" in Free Exercise jurisprudence. Almost fifteen years later, the lower courts continue to interpret this concept in wildly disparate ways. Some have applied it as a meaningful exception to the general rule that incidental burdens on religious exercise, however substantial, do not trigger strict scrutiny. Others have defiantly refused to apply the concept at all, rejecting it as incoherent. Still others fall at various points in between.

Fifteen years is more than fair opportunity for the lower courts to sort out this issue for themselves. Indeed, allowing more time has only led to deeper division, as the decision below from the California Supreme Court exemplifies. The Court should therefore grant the writ and bring some long-overdue clarity to this especially confused and confusing area of free exercise jurisprudence.

REASONS FOR GRANTING THE WRIT

I. THIS COURT'S REVIEW IS NEEDED TO RESOLVE CONFUSION AMONG THE LOWER COURTS REGARDING THE MEANING OF "HYBRID RIGHTS."

'Tis no sinister nor no awkward claim,
Pick'd from the worm-holes of long-vanish'd days,

WILLIAM SHAKESPEARE, THE LIFE OF KING HENRY THE FIFTH, act II, sc. 4.

In *Smith*, this Court announced the general rule that laws burdening religious exercise do not trigger strict scrutiny if they are "neutral" and "generally applicable." But *Smith* expressly noted a category of cases, such as *Wisconsin* v. *Yoder* and *Cantwell* v. *Connecticut*, where the Court *has* applied strict scrutiny to burdens imposed by neutral and generally applicable laws. *Smith* did not overrule these cases, but instead distinguished them as "hybrid situations" involving "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, or the right of parents . . . to direct the education of their children." *Id.* at 881-82 (citations omitted).

While this concept of "hybrid rights" may have been helpful to explain past cases, it has been a source of confusion – still proliferating after almost fifteen years – among the lower courts in deciding subsequent cases. In particular, the federal Courts of Appeals and state Supreme Courts differ widely on the question of how strong the companion constitutional claim must be in order to fall within the "hybrid rights" exception.

A. Some Lower Courts Have Repudiated the Concept of "Hybrid Rights" Entirely.

The Second Circuit has rejected the concept of hybrid rights as "dicta . . . not binding on this court," even though that decision put the court at odds with a majority of the other Courts of Appeals. *Knight* v. *Connecticut Dep't of Pub. Health*, 275 F.3d 156, 167 (2d Cir. 2001); *accord Leebaert* v. *Harrington*, 332 F.3d 134, 143-44 (2d Cir. 2003). The Sixth Circuit has been the only other court to reject the hybrid rights principle so explicitly, calling it "completely illogical" and holding that, "at least until the Supreme Court holds that legal standards under the Free Exercise Clause vary depending on whether other constitutional rights are implicated, we will not use a stricter legal standard than that used in *Smith* to evaluate generally applicable, exceptionless state regulations under the Free Exercise Clause." *Kissinger* v. *Bd. of Trs.*, 5 F.3d 177, 180 (6th Cir. 1993); *accord Prater* v. *City of Burnside*, 289 F.3d 417 (6th Cir. 2002).

Although the First Circuit has not rejected the "hybrid rights" concept entirely, it appears to have rejected one part of it that *Smith* specifically identified. In *Brown* v. *Hot, Sexy & Safer Productions, Inc.*, 68 F.3d 525 (1st Cir. 1995), the First Circuit examined a hybrid claim that a mandatory sex education program at a public high school burdened the free exercise of religion *and* the right of parents to direct the education of their children. Although *Smith* specifically identified the right "to direct the education of their children" as a right that had successfully been asserted in conjunction with a free exercise claim, 494 U.S at 882, the First Circuit concluded that "the Supreme Court has yet to decide whether the right to direct the upbringing and education of one's children is among those fundamental rights whose infringement merits heightened scrutiny." 68 F.3d at 533.

B. Some Lower Courts Have Required an Independently Sufficient Constitutional Violation to Qualify for the "Hybrid Rights" Exception to *Smith*.

Four federal circuits have required a plaintiff to establish a constitutional violation that would stand alone, even apart from the plaintiff's free exercise claim, in order to trigger strict scrutiny as a "hybrid right." Although this interpretation is not as expressly defiant as that adopted by the Second and Sixth Circuits, it has the same effect of rendering the doctrine meaningless.

In *Civil Liberties for Urban Believers* v. *City of Chicago*, 342 F.3d 752 (7th Cir. 2003), the Seventh Circuit rejected the plaintiffs' hybrid rights claim because the companion claims "*individually* lack[ed] the merit necessary to withstand summary judgment." *Id.* at 765 (emphasis added).[2]

In *Tenafly Eruv Ass'n* v. *Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002), the plaintiff made a hybrid claim involving a free exercise claim accompanied by a free speech claim. But the Third Circuit first examined the religiously-motivated action as a separate free speech claim and found that it could not be "deemed expressive conduct." In the absence of an independently sufficient free speech claim, the court concluded that the plaintiffs did not "assert such a 'hybrid rights' claim." *Id.* at 161 n.26.

Similarly, the D.C. Circuit found a successful hybrid rights claim, but only after determining that the plaintiff

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2 In this decision, the Seventh Circuit cites to a Ninth Circuit opinion on hybrid rights. *Id.* at 765 (citing *Miller v. Reed*, 176 F.3d 1202 (9th Cir. 1999)). However, the standard that the Seventh Circuit actually applies appears stricter than the "colorable" standard enunciated by the Ninth Circuit.

established an additional, independently meritorious constitutional claim. *E.E.O.C.* v. *Catholic University of America*, 83 F.3d 455 (D.C. Cir. 1996). The court found that the EEOC's attempt to apply Title VII to a religious university in its decision whether to promote a professor of Canon Law violated the Establishment Clause, because that enforcement would "excessively entangle the government in religion." *Id.* 468. The court concluded that, "[a]s a consequence, this case presents the kind of 'hybrid situation' referred to in *Smith* that permits us to find a violation of the Free Exercise Clause even if our earlier conclusion that [the E.E.O.C.'s enforcement violates the Free Exercise Clause on other grounds] should prove mistaken." *Id.*

Similarly, in *Brown* v. *Hot, Sexy & Safer Productions, supra,* the First Circuit has rejected a hybrid rights claim, because the free exercise claim was "not conjoined with an *independently protected* constitutional protection." 68 F.3d at 539 (emphasis added); *accord Gary* v. *Manchester*, No. 03-1211, 2004 U.S. App. LEXIS 13593, at *4 (1st Cir. July 1, 2004) (rejecting hybrid claim because free exercise was "not linked to a *separate* constitutional claim").

C. Some Lower Courts Have Required a "Colorable" Claim of a Constitutional Violation to Qualify for the "Hybrid Rights" Exception to *Smith*.

The Ninth and Tenth Circuits have adopted a looser, "colorable" standard in an attempt to avoid the redundancy of the stricter standard. Both courts have explained that this means "that the plaintiff must show a fair probability or likelihood, but not a certitude, of success on the merits." *Axson-Flynn* v. *Johnson*, 356 F.3d 1277, 1297 (10th Cir. 2004). *Accord Miller* v. *Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999); *San Jose Christian College* v. *City of Morgan Hill*,

360 F.3d 1024 (9th Cir. 2004). The Ninth Circuit has added that the colorable standard is analogous to the "likelihood of success on the merits" standard for preliminary injunctions. *Thomas* v. *Anchorage Equal Rights Comm'n*, 165 F.3d 692, 705-06 (9th Cir. 1999), *vacated on ripeness grounds*, 220 F.3d 1134 (9th Cir. 2000) (en banc).

D. Some Courts Have Left Ambiguous How Strong a Companion Claim Must Be to Qualify for the "Hybrid Rights" Exception to *Smith*.

The remaining appellate courts to address the meaning of "hybrid rights" simply defy categorization. Some provide vague guidance on the meaning of the term, while others merely recite the relevant language from *Smith*, and then decide – without an apparent, principled basis – whether to apply strict scrutiny.

In *City Chapel Evangelical Free Church* v. *City of South Bend*, 744 N.E.2d 443 (Ind. 2001) (plurality), the Supreme Court of Indiana addressed the question of hybrid rights in a case where the free exercise claim was paired with an expressive association claim. A plurality concluded that in order "to qualify for this hybrid claim exception," the plaintiff must demonstrate that the government action would both "(1) *significantly affect* or burden its members' right to expressive association and (2) *substantially burden* a religious practice." *Id.* at 454 (emphasis added). Two dissenting justices took a narrower view of hybrid rights, arguing that the plaintiff's claim was not even potentially hybrid. "[A] hybrid claim requires at least something more than collective religious exercise to add a right of association to the religious exercise rights of the complainants." *Id.* at 458 (Boehm, J., dissenting); *accord id.* at 454-55 (Shepard, C.J., concurring in part and dissenting in part).

The New York Court of Appeals has required that "discrete" constitutional claim must also be "implicated" to qualify as a hybrid right. In *New York State Employment Relations Board* v. *Christ the King Regional High School*, 682 N.E.2d 960 (N.Y. 1997), the court considered a private school's appeal from a requirement that the school bargain with a labor union. The court rejected the argument that the "application of the State Labor Relations Act to it would interfere with the fundamental rights of parents of students to direct the religious education of their children." *Id.* at 964. The court explained that

> *Smith* did not intend its hybrid exception to turn back on itself in circumstances such as this singularly generic First Amendment setting and circumstance. Rather, the Court expressly referenced the hybrid exceptional situations to free exercise settings in which other *discrete constitutional protections* are also implicated.

Id. (emphasis added) (citations omitted). Thus it held, "[A]ppellant's free exercise claim, invoked with sweeping, threshold cloakage, cannot prevail." *Id.*

The Supreme Court of Washington found a hybrid situation triggering strict scrutiny, but no apparent basis other than the "in conjunction with" language of *Smith* itself. In *First Covenant Church of Seattle* v. *City of Seattle*, 840 P.2d 174, 182 (Wash. 1992) (en banc), the court examined the municipal landmark designation of a church and found that the church's exterior was "freighted with religious meaning," so that "regulation of the church's exterior impermissibly infringes on the religious organization's right to free exercise and free speech." *First Covenant*, 840 P.2d at 182. Thus, "the church's claim is 'hybrid' because designation not only violates First Covenant's right to freely exercise religion, it infringes on First Covenant's right to free speech." *Id.*;

accord First United Methodist Church of Seattle v. *Hearing Examiner for Seattle Landmarks Pres. Bd.*, 916 P.2d 374 (Wash. 1996).[3]

The Supreme Courts of Michigan and Vermont have applied strict scrutiny – both where parental rights in the education of children were involved – without any meaningful examination of the strength of the companion claim. The Michigan Supreme Court simply stated that, "In [*Smith*], the Court ruled that the 'Free Exercise Clause in conjunction with other constitutional protections, such as . . . the right of parents . . . to direct the education of their children' demands the application of strict scrutiny. Hence [the state law] must undergo strict scrutiny to survive a free exercise challenge." *People* v. *DeJonge*, 501 N.W.2d 127, 134-35 (Mich. 1993) (citing *Smith*, 494 U.S. at 881) (other citations omitted). The Supreme Court of Vermont concluded that, "In the lexicon of [*Smith*], this is a 'hybrid situation' implicating more than a free exercise claim and, thus, the State must show more than that the truancy law is of general applicability and is valid and neutral." *State* v. *DeLaBruere*, 577 A.2d 254, n.8 (Vt. 1990).[4]

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3 Notably, the court emphasized its refusal to rest its decision exclusively on federal grounds, because of its desire to "eschew the uncertainty of [*Smith*]," and especially its confusing concept of hybrid rights. *First Covenant*, 840 P.2d at 185.

4 The court still expressed doubt as to the proper scrutiny to apply, illustrating the confusion surrounding the hybrid rights language of *Smith*. In contradiction to its earlier classification of the claim as hybrid, the court remarked, "The recent opinion in *Smith* appears to direct that the State, in this case, need meet only a reasonable relationship standard." *Id.* at n.10 (citation omitted). The court concluded, however, "Since we find that the State has shown a compelling state interest, we would necessarily also find that the State has met the lesser burden of *Smith*." *Id.*

Finally, the Eighth Circuit has been similarly superficial in acknowledging and applying strict scrutiny on a hybrid rights theory without meaningful explanation. In *Cornerstone Bible Church* v. *City of Hastings*, 948 F.2d 464 (8th Cir. 1991), the court emphasized that its "reversal of the summary judgment [against the church's companion claims] breathes life back into the Church's 'hybrid rights' claim; thus, the district court should consider this claim on remand." *Id.* at 473. However, the court failed to give the district court any discernable standard by which to judge whether the companion claims were strong enough to achieve hybrid status.

II. THE DECISION BELOW EXEMPLIFIES AND COMPOUNDS THE EXISTING CONFUSION REGARDING "HYBRID RIGHTS."

In approaching the question of "hybrid rights" in the decision below, the California Supreme Court noted the disparity among other courts addressing that question, as well as the practical risks associated with interpretations at either extreme. It rejected the "colorable" standard of the Ninth and Tenth Circuits as too loose, stating that "such a rule [would not] make sense" because, as Justice Souter pointed out, "'[I]f a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule.'" *Catholic Charities of Sacramento, Inc.* v. *Superior Court*, 85 P.3d 67, 88 (Cal. 2004) (citing *Lukumi*, 508 U.S. at 567 (Souter, J., concurring in part)). Accordingly, the court below adopted a stricter standard and rejected Catholic Charities' hybrid rights claim because it did not "allege[] a meritorious constitutional claim that might justify the theory's application." *Catholic Charities*, 85 P.3d at 88.

The California Supreme Court invited this Court to clarify what it meant in *Smith*:

> The high court has not . . . determined whether the hybrid rights theory is valid or invoked it to justify applying strict scrutiny to a free exercise claim.

Id. It suggested that the theory may be "dictum" or a "misreading of *Smith*." *Id.* *Amicus* respectfully suggests that the Court take this opportunity—in a case that clearly involves Free Speech and Establishment Clause issues and thus implicates the hybrid rights doctrine—to provide much-needed guidance in First Amendment jurisprudence.

In sum, the federal Courts of Appeals and state Supreme Courts are at a loss to define "hybrid rights" in a principled manner that is consistent with this Court's decision in *Employment Division* v. *Smith,* 494 U.S. 872 (1990). As a result, the term "hybrid rights" has become an exceptionally muddled concept in an area of constitutional jurisprudence that is already well known for its complexity and lack of clarity. Therefore, the Court should grant the writ in this case, which exemplifies that confusion and raises this issue squarely for decision.

CONCLUSION

For all of the foregoing reasons, the writ should be granted.

Respectfully submitted,

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